IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 21, 2007

MAXINE JONES, ET AL. v. MONTCLAIR HOTELS TENNESSEE, LLC, ET AL.

Appeal from the Circuit Court for Davidson County
No. 04C-2248 Barbara N. Haynes, Judge

No. M2006-01767-COA-R3-CV - Filed December 5, 2007

Plaintiffs sustained personal injuries when an elevator in Defendants' hotel fell approximately six stories on August 4, 2003. Plaintiffs filed suit exactly one year later on August 4, 2004. Plaintiffs did not properly identify the hotel's owner/operator as a party-defendant in their original complaint and thereafter filed three amended complaints. The elevator servicing company was named as a defendant in the original complaint and was later dismissed on summary judgment. Following the trial court's grant of summary judgment in favor of the elevator servicing company, Plaintiffs finally identified the proper defendant hotel owners in their third amended complaint filed on April 17, 2006. The trial court dismissed the complaint on the determination that it was time-barred by the applicable one year statute of limitations. Plaintiffs appeal and claim the trial court erred in dismissing their cause of action against the hotel because their third amended complaint should relate back to the date of the original pleading thus placing it within the statute of limitations pursuant to Rule 15 of the Tennessee Rules of Civil Procedure. Additionally, Plaintiffs argue the defendant-hotel's failure to register with the Secretary of State should impart to it constructive notice of the action. Finding no error below, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Jeffrey O. Powell, Goodlettsville, Tennessee, for the appellants, Maxine Jones and Juanita Allen.

David A. Changas, Nashville, Tennessee, for the appellees, Montclair Hotels Tennessee, LLC and Tennessee Oakmont, LLC.

OPINION

This appeal concerns the application of the one-year statute of limitations in an action for personal injury as it relates to Plaintiffs' ability to amend their complaint in order to name the hotel's owner/operator as the defendant.

I. FACTUAL AND PROCEDURAL BACKGROUND

Maxine Jones and Juanita Allen are residents of Texas and were guests at the Ramada Inn, 920 Broadway, while visiting Nashville in 2003. On August 4, 2003, they boarded an elevator on the sixth floor of the hotel and headed down to the lobby. Approximately six people were already in the elevator when Ms. Jones and Ms. Allen joined them. The elevator proceeded to the fifth floor, picking up at least two other passengers before beginning its descent to the lobby. The elevator then picked up speed and suddenly dropped, free-falling past the lobby level until crashing into the bottom of the elevator shaft. Ms. Jones and Ms. Allen sustained numerous injuries as a result of the nearly six story fall.

Ms. Jones and Ms. Allen (collectively "Plaintiffs") hired local counsel in Nashville, Mr. Jeffrey O. Powell, to represent them in their personal injury action against the hotel. On August 4, 2004, Mr. Powell filed a complaint in the Circuit Court for Davidson County seeking damages for Plaintiffs' injuries based on negligence and premises liability. The complaint was filed exactly one year after the accident and on the last day it could be filed before the statute of limitations on Plaintiffs' claims expired. The complaint named as defendants Sathya Sai Investments, LLC and Mid-Tenn Elevator Company, Inc. Sathya Sai Investments, LLC ("Sathya") was the corporation believed to be doing business as and the owner of the Ramada Inn in Nashville. Mid-Tenn Elevator Company, Inc. ("Mid-Tenn") was the elevator servicing company responsible for the maintenance and inspection of the elevator at issue in this case.

Mid-Tenn and Sathya were served with the summons and complaint. Thereafter, a representative from Sathya contacted Mr. Powell to inform him that Sathya owned a Ramada Inn located in Chattanooga, Tennessee but did not own the Ramada Inn located in Nashville. Upon learning this information, Plaintiffs filed their first amended complaint in accordance with Rule 15.01 of the Tennessee Rules of Civil Procedure on January 19, 2005. Plaintiffs' first amended complaint simply substituted the name "Ramada Inn" for Sathya as defendant in the caption and in paragraph 3, describing it as "a Tennessee corporation with its principal place of business located at 920 Broadway, Nashville, Tennessee 37203." No changes were made in the complaint with respect to co-defendant Mid-Tenn.

Mr. Powell later explained that he contacted the Tennessee Secretary of State's office prior to filing the original complaint in order to obtain the name and location of Ramada Inn's designated agent for service of process.[1] Upon learning that Sathya was not the proper defendant, counsel again

[1] Tennessee Code Annotated § 48-15-101 requires that each corporation doing business in the state of Tennessee continuously maintain a registered office and a registered agent in this state, the name of which is filed with the Secretary of State. The corporation's registered agent is its designated agent to receive service of process.

called the Secretary of State and was told that no other owners or agents for service of process were on file for "Ramada Inn." Mr. Powell decided to proceed against "Ramada Inn" and apparently prepared a new summons on January 19, 2005. However, nothing in the record suggests an attempt to effect service of the complaint on "Ramada Inn" in Nashville. The case seemed to progress at this point against defendant Mid-Tenn only.

Mid-Tenn filed its Answer on July 6, 2005 after a second amended complaint was submitted to include an *ad damnum* clause.[2] In addition to denying fault on the claims of negligence and premises liability, Mid-Tenn asserted the affirmative defenses of comparative fault and comparative negligence against co-defendant Ramada Inn and Plaintiffs. Mid-Tenn alleged Ms. Jones and Ms. Allen either caused or contributed to their injuries when they entered and/or remained on the elevator claiming they knew or should have known it was overloaded with passengers in excess of its weight capacity. Mid-Tenn also asserted comparative fault against the other elevator passengers for their contribution to overloading the elevator in its answer. It then listed the names, addresses, and phone numbers of ten other passengers who were in the elevator with Plaintiffs at the time of the accident.

On January 23, 2006, Mid-Tenn filed a motion for summary judgment to which Plaintiffs did not respond. Accordingly, the Circuit Court for Davidson County granted the motion on March 20, 2006 and dismissed Mid-Tenn from the case.[3]

Mr. Powell soon discovered that other lawsuits arising from the incident had been previously filed by other elevator passengers and were already settled. Only then did counsel investigate these other actions and learn the proper identity of the hotel owners, Montclair Hotels Tennessee, LLC ("Montclair Hotels") and Tennessee Oakmont, LLC ("Oakmont") (collectively "Defendants"). Plaintiffs filed a third amended complaint on April 17, 2006 substituting Montclair Hotels and Oakmont as defendants without seeking leave of the court and without obtaining the written consent of the newly identified defendants.[4] This third amended complaint was filed more than a year and a half after the statute of limitations expired and over a year after Plaintiffs filed their first amended complaint acknowledging that Sathya was not the proper defendant.

Montclair Hotels and Oakmont were properly served on May 8, 2006. They then moved to dismiss Plaintiffs' action for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure on June 7, 2006. Montclair Hotels and

---

Tenn. Code Ann. § 48-15-104(a).

[2] On March 2, 2005, Mid-Tenn moved for a more definite statement pursuant to Tenn. R. Civ. P. 12.05 seeking a specific amount of damages, or ad damnum clause, from the Plaintiffs. The parties agreed to the amendment as per the order entered March 28, 2005.

[3] Mid-Tenn is not a party to this appeal.

[4] Once Mid-Tenn filed its Answer on July 6, 2005, Tennessee Rule of Civil Procedure 15.01 required Plaintiffs to obtain either the written consent of the adverse party or the permission of the court before they could properly amend their complaint to name new defendants.

Oakmont asserted the one year statute of limitations for personal injury actions as grounds to support their motion to dismiss.

Upon review of the pleadings and argument on the matter, the trial court found that the applicable statute of limitations was a bar to any claims Plaintiffs may have had against Montclair Hotels and Oakmont and dismissed the case on July 21, 2006. Plaintiffs appeal.

II. Standard of Review

On appeal are issues of law raised by the trial court's dismissal of a personal injury action for failure to state a claim upon which relief can be granted, pursuant to Tennessee Rules of Civil Procedure 12.02(6). Motions based on Rule 12.02(6) test only the legal sufficiency of the complaint and not the strength of the plaintiff's evidence. *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997). Accordingly, when considering a Rule 12.02(6) motion, "'courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.'" *Temlock v. McGinnis*, 211 S.W.3d 238, 240 (Tenn. Ct. App. 2006) (quoting *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)). Because the factual allegations of the complaint are taken as true, the issues raised on a motion to dismiss are questions of law and not fact. *Stein*, 945 S.W.2d at 716. We review questions of law *de novo* upon the record with no accompanying presumption of correctness. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleson*, 854 S.W.2d 87, 91 (Tenn. 1993).

III. Discussion

The dispositive issue in this appeal is whether Plaintiffs' personal injury claims against Defendants relate back to the date on which the original complaint was filed so as to fall within the applicable statute of limitations. Actions for personal injury must be commenced within one year after the date on which the action accrued. Tenn. Code Ann. § 28-3-104(a)(1). Personal injury actions generally accrue when the tortious act occurs and the plaintiff sustains the resultant injury. *Hunter v. Brown*, 955 S.W.2d 49, 51 (Tenn. 1997).

The Plaintiffs' cause of action accrued when Ms. Jones and Ms. Allen were involved in the elevator accident on August 4, 2003, setting the statute of limitations to expire on August 4, 2004. The Plaintiffs filed their initial complaint on the last date possible but still within the one year statute of limitations. The problem initially arises here because they named Sathya as a defendant in the action instead of Montclair Hotels and Oakmont. "Plaintiffs who file their lawsuit at or near the end of the statute of limitations period face a difficult predicament if they make a mistake regarding the name of the defendant." *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 796 (Tenn. Ct. App. 1997).

Rule 15 of the Tennessee Rules of Civil Procedure is designed to remedy certain mistakes in the pleadings and "grants a party an absolute right to amend once within a specified time, and allows amendment freely at any time by consent of the parties or by leave of court." Tenn. R. Civ. P. 15.02 advisory commission comments. The rule further allows plaintiffs who misname

defendants to amend their complaint to correct the misnomer which will, provided certain criteria are met, relate back to the original filing date to avoid the harsh result of the statute of limitations extinguishing their claim and potential relief. *McCracken*, 958 S.W.2d at 796 (Tenn. Ct. App. 1997); *see* Tenn. R. Civ. P. 15.03.

Rule 15.03 of the Tennessee Rules of Civil Procedure provides as follows:

> Whenever the claim . . . asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the [statute of limitations] or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Tenn. R. Civ. P. 15.03 (2007). Therefore, a plaintiff's amendment to the complaint will not relate back against the defendant unless the following requirements are met: (1) the claim in the amendment must arise out of the same conduct, transaction, or occurrence involved in the original complaint; (2) the new defendant brought in by amendment must not be prejudiced in maintaining its defense, and (3) the new defendant must have known or should have known it would have been sued had it not been for the misnomer or other similar mistake. *McCracken*, 958 S.W.2d at 796 (citing *Lease v. Tipton*, 722 S.W.2d 379, 380 (Tenn. 1986)).

The critical element involved in determining whether or not the amendment in this case will relate back is notice. *Floyd v. Rentrop*, 675 S.W.2d 165, 168 (Tenn. 1984). In the context of relating amended pleadings back, "notice" means notice to the defendant that a lawsuit has been filed asserting a legal claim against it. *Smith v. Southeastern Properties, Ltd.*, 776 S.W.2d 106, 109 (Tenn. Ct. App. 1989). A party to be added by amendment must receive notice of the lawsuit before the limitation period expires or within 120 days, the time within which to effect service of process, in order for the amendment to relate back to the filing of the complaint under Rule 15.03.[1] A defendant's notice that the event, which forms the basis of the lawsuit, occurred is insufficient notice under the rule and, alone, will not allow the Plaintiff's amendment to relate back. *Smith*, 776 S.W.2d at 109 (citing *Osborne Enterprises, Inc. v. City of Chattanooga*, 561 S.W.2d 160, 164 (Tenn. Ct. App. 1977)).

[1] Tennessee amended Rule 15.03 in 1995 to incorporate similar changes made to the federal rule as a result of *Schiavone v. Forturne*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.E.2d 18 (1986) (amendment did not relate back because notice to proper defendant was not received until two weeks after statute of limitations ran even though complaint was timely filed). The express purpose of the revision was to allow an action commenced under a corporate defendant's trade name just before the statute of limitations runs but not served on the corporation's agent until after the statute had run to be corrected by amendment. Tenn. R. Civ. P. 1503. advisory commission cmt. 1995.

Plaintiffs recognize their third amended complaint was improper as it was unilaterally filed without leave of the court or Defendants' consent. Whether the court would have granted Plaintiffs leave to amend under these circumstances, however, is irrelevant because we find Plaintiffs do not meet the notice conditions of Rule 15.03 and that this failure prevents the relation back of their amendment.

Ms. Jones and Ms. Allen insist Defendants had sufficient notice of the lawsuit under Rule 15.03 because the hotel owners had already defended several other lawsuits arising from the same incident. It is undisputed that Defendants knew the accident occurred on their premises on August 4, 2003 and knew there were numerous passengers aboard the elevator when the accident occurred. And, Montclair Hotels and Oakmont clearly had notice that other lawsuits were filed against them as a result of the accident. However, this knowledge in no way alerts Defendants to Ms. Jones' and Ms. Allen's lawsuit. The language of the rule is clear: the new defendant must have "such notice of the institution of *the action* that [it] will not be prejudiced in maintaining a defense on the merits[.]" Tenn. R. Civ. P. 15.03 (emphasis added). Notice need not be formal but it must be actual. *See Smith*, 958 S.W.2d at 796; *see also Drake v. Smith*, 1990 WL 113236, * 2 (Tenn. Ct. App. Aug. 9, 1990) (no Tenn. R. App. P. 11 application filed). There simply is no evidence in the record proving Montclair Hotels and Oakmont had notice of *this* lawsuit prior to being served on May 8, 2006. Thus, Defendants had no notice of Plaintiffs' action until nearly two years after the statute of limitations expired.

When Plaintiffs learned that Sathya was not the owner of the Ramada Inn in Nashville, they simultaneously learned that there was a defect in their complaint. The record indicates Mr. Powell called the Secretary of State's office once more but again found no agent listed under "Ramada Inn." Thereafter, Mr. Powell amended the complaint and did nothing to discover the proper identity of the defendant hotel owner for over a year. Simply amending the complaint to name "Ramada Inn" without any evidence in the record suggesting an attempt to actually serve process on that entity's agent did not impart actual or constructive notice to the proper defendant.

Plaintiffs point to the fact that another elevator occupant who filed suit against Defendants originally named Sathya and suggest that this somehow justifies their mistake, arguing that Defendants knew there was confusion as to their identity. While we do not believe these other lawsuits are relevant to Plaintiffs' cause, we do note that these other plaintiffs were inevitably able to properly identify Montclair Hotels and Oakmont. At least one attorney obtained the proper names by actually going down to the Ramada Inn. Due diligence requires at least some effort to identify the proper parties beyond a couple of phone calls. It is the party seeking to amend his/her complaint who bears the burden of proving that the failure to name the new defendant in the initial complaint resulted from a mistake concerning the identity of the proper defendant. *Sallee v. Barrett*, 171 S.W.3d 822, 830 (Tenn. 2005) (citing *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 821 S.W.2d 938, 941 (Tenn. Ct. App. 1991)).

We find unpersuasive Plaintiffs' argument that Montclair Hotels and Oakmont attempted to shield themselves from any possible lawsuit by failing to register either of their corporate identities with the Secretary of State. This, they contend, warrants charging Defendants with constructive notice of any lawsuit filed against them. While it appears, based on Mr. Powell's inquiries with the

Secretary of State, that Montclair Hotels and Oakmont were not registered under the name "Ramada Inn," this does not mean they violated the statutory requirement. *See* Tenn. Code Ann. § 48-15-101 (requiring corporations to file names of registered office and agent with Secretary of State). Filing under "Montclair Hotels Tennessee LLC" and "Tennessee Oakmont, LLC" did not make it particularly easy for counsel to identify the proper defendants associated with "Ramada Inn" or to properly effect service of process, but the record does not reveal that Mr. Powell made any effort to investigate outside two telephone calls. There is nothing in the record to substantiate Plaintiffs' contention that Montclair Hotels and Oakmont were not properly registered with the Secretary of State.

IV. CONCLUSION

We find that Ms. Jones and Ms. Allen did not meet their burden of proving that the relation back feature of Tennessee Rule of Civil Procedure 15.03 applies to save their claims from the statute of limitations. Plaintiffs' third amended complaint fails to relate back to the date of the original filing and, as such, fails to state a claim upon which relief can be granted. Plaintiffs failed to show Montclair Hotels, LLC and Tennessee Oakmont, LLC had notice of their lawsuit and its attendant claims. Plaintiffs also failed to show that the misnomer resulted from a mistake concerning Defendants' identity and that Defendants knew or should have known but for their mistake, Defendants would have been sued. Therefore, we find that the requirements of Rule 15.03 were not satisfied and that the applicable one year statute of limitations bars any claims arising from this incident as against Montclair Hotels and Oakmont.

The judgment of the trial court is affirmed. Costs of this appeal are assessed to Appellants Maxine Jones and Juanita Allen, and their surety, for which execution may issue if necessary.

_____

ANDY D. BENNETT, JUDGE